82-670

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CASE NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THURMAN H. HOWARD,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILROAD COMPANY,
Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI STATE CIVIL CASE

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QUESTIONS PRESENTED

May the Georgia Court of Appeals and/or the Supreme Court of Georgia refuse to apply Federal Law in an action brought under the Federal Employers' Liability Act, 45 USCA §51 et seq?

May an employee prove his unemployment during the time of his injury as an element to be considered by the jury is assessing damages where he maintains that the unemployment resulted from his injury-related disability and where the railroad maintains that the unemployment resulted from suspension for cause?

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 249 Ga. 713, and is reproduced in Appendix A at pages 1-7. The opinion of the Court of Appeals of Georgia is reported at 161 Ga. App. 560, and is reprinted in Appendix A at pages 8-14.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on July 8, 1982, (App. A, p. 1). A timely petition for rehearing was filed and denied on July 22, 1982. (App. A, p. 1). Jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

45 U.S.C.A. SECTION 51

> "SECTION 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FOR NEGLIGENCE; DEFINITION OF EMPLOYEES.
>
> "Every common carrier by railroad while engaging in commerce between any

of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C.A. SECTION 55:

SECTION 55. CONTRACT, RULE, REGULATION, OR DEVICE EXEMPTING FROM LIABILITY; SET-OFF.

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

STATEMENT

This action began as a suit for damages under the FELA for injuries sustained while petitioner was employed by the respondent railroad. During the trial, the petitioner introduced evidence which showed that he was injured, because of a broken coupling, on July 1, 1978. As a result of the injury, petitioner experienced back pain and was from time to time unable to work.

In July, 1980, petitoner was dismissed by the railroad allegedly for cause at a time when petitioner was marked off and not working because of the FELA injury.

Petitioner contends the railroad used the disciplinary action as a pretext for firing him in order to reduce its liability for lost wages in his pending FELA case. Petitioner, following appeal of his discharge through proper administrative procedures was reinstated by the railroad, without back pay, shortly before the trial of his injury case in 1981.

At the time of his discharge, petitioner was not able to work because of the injuries suffered in 1978 while employed by the railroad. At trial, petitioner contended that the railroad "fired" him in order to escape payment of approximately $11,000.00 in wages due him during the period from his firing until reinstatement. Petitioner argued that a jury question existed as to the effect of the discharge upon his right to recover damages for lost wages and future employ-

ability. The trial court permitted evidence of petitioner's unemployment to be introduced at trial and a jury verdict in petitioner's favor for $565,602.23 followed.

On appeal, the Court of Appeals of Georgia, Central of Georgia Railroad Company v. Howard, 161 Ga. App. 560 (1982) reversed, holding that the trial court should have granted the railroad's Motion for Mistrial because of the introduction of "grossly prejudicial" and irrelevant evidence at trial concerning petitioner's "firing" at trial as well as because of "abominably inflammatory" remarks made by petitioner's attorney concerning the "firing".

The Court of Appeals of Georgia did not cite any federal law or decision of any federal court in support of its reversal, even though ample federal law had been supplied to that Court through petitioner's briefs.

Certiorari was granted by the Supreme Court of Georgia to consider "whether the dismissal of Howard was relevant to the issues dis-

puted lost wages and/or future employability. Certiorari was vacated following oral argument and submission of multiple briefs by both parties. Howard v. Central of Georgia Railroad Company, 249 Ga. 713 (1982) (Smith and Gregory, JJ. dissenting) The dissent cited numerous FELA cases, including cases from the Supreme Court of the United States, to demonstrate that the evidence of the discharge was "highly relevant and probative on the issues of lost wages and future employability" was, therefore, properly admitted by the trial judge, thereby obviating any need for granting of the railroad's Motion for Mistrial.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia conflicts with principles established by the Court in Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490, 100 S.C. 755, 62 L.Ed.2d 689 (1980) and

Michigan R. Co. v. Vreeland, 227 U.S. 59, 33 S.C. 192, 57 L.Ed.2d 417 (1913). No federal law was cited by either Georgia Court. Yet, in Liepelt, the Court made clear the questions of damages in FELA actions are federal in nature, even where the case is brought in state court. In Vreeland, it was held that carriers are liable to their employees under the FELA for loss of time and diminished earning power.

II.

The decisions of the Georgia courts are irreconcilable with principles established in Alexander v. Gardner - Denver Company, 415 U.S. 36, 94 S.C. 1011, 93 L.Ed 2d 123 (1974). In Alexander, the Court held that an employee urging a Title VII employment discrimination claim was not bound by a prior arbitration award. The Court pointed out that where there exists a federal right independent of the right to administrative appeal, the employee was entitled to proceed under the independent substantive law. Such

rationale extends to the present case. Just as the plaintiff in Alexander had done, petitioner sought to have his claim for lost wages reviewed in his request for reinstatement under the Railway Labor Act. The railroad opposed petitioner's claim for lost wages and the burden was therefore on petitioner during the trial of his FELA case to show that his $11,000.00 lost wages resulted from his on-the-job injury. Petitioner's claim for back pay is an element of his damages under the FELA, and is separate and distinct from any arbitration remedies he may have. In Alexander, the court held that "[t]he distinctly separate nature of the contractual (i.e. in this case, arising under the Railway Labor Act) and statutory (i.e. in this case arising under the FELA) rights is not vitated hereby because both were violated as a result of the same occurrence." 415 U.S. at 49, 50. Therefore, petitioner should have been permitted to pursue each and every element of his lost wages claim during his lawsuit. Evidence of the arbitral decision should be

"admitted...and given such weight as the court (here the jury) deems appropriate." 415 U.S. at 60.

III.

The railroad's argument that it could use a disciplinary violation as a pretext for discharging an injured employee who could not work because of an FELA injury and that this discharge would effectively cut off all rights to future lost wages as well as the right to be compensated for inability to work and earn a living is violative of 45 USCA §55 which prohibits any "contract, rule or device" to defeat "any liability" under the FELA.

The United States Fifth Circuit Court of Appeals has implicitly rejected the railroad's argument in Hendley v. Central of Georgia Railroad Co., 609 F.2d 1146 (5th Cir. 1980) which held that matters arising under Congressional Acts of the United States (including the FELA) must proceed under such Acts in courts of law and

are not subject to administrative action under the Railway Labor Act.

IV.

The decisions of the Georgia Courts is directly in conflict with the federal law set forth in Barnes v. Norfolk Southern Railway Co., 333 F.2d 192 (4th Cir. 1964), which is on "all fours" with the present case. In Barnes, the court noted: "Appellant next urges that the trial judge improperly permitted Barnes to prove his unemployment at the date of the trial as an element to be considered by the jury in assessing damages. In an attempt to escape liablity for his continuing unemployment, appellant offered evidence that Barnes was rehired by the company subsequent to his injury, but had been thereafter suspended for cause...Barnes, of course, maintained that the real reason for his suspension ...was his disability."

Significantly, the United States Court of Appeals for the Fourth Circuit held: "We think Barnes' unemployment was a proper matter

for jury consideration. Appellant was afforded full opportunity to explain its version of the reasons involved in Barnes' suspension and continuing unemployment. The jury was free to believe appellant's or Barnes' version, but we think the choice was properly theirs." 333 F.2d at 197.

Similarly, in the present case, in order for petitioner to prove his lost wages and his loss of ability to work, it was necessary for Howard to place into evidence the circumstances surrounding his discharge and his status at the time of the discharge. As in Barnes, the railroad was afforded full opportunity by the trial judge to explain its version of the reasons involved in Howard's discharge, but the choice of whom to believe was within the province of the jury, and their choice was demonstrated by the $565,602.23 verdict in favor of Howard.

V.

Remarks of petitioner-Howard's attorney

concerning the circumstances surrounding his discharge and his status at the time of the discharge were clearly authorized by Georgia State Court cases interpreting the FELA. Seaboard Coast Line Railroad Company v. Towns, 156 Ga. App. 24 (274 S.E.2d 74) (1980). If evidence of petitioner's dismissal was relevant to the issues of lost wages and future employability, as it clearly was shown supra, then petitioner's counsel was properly permitted "to draw deductions" from that evidence by the trial court. Towns, supra at 26.

CONCLUSION

If allowed to stand, the decisions of the Georgia courts in the instant case will be a dangerous precedent under which employees asserting FELA will have their rights to damages for lost wages and future employability effectively curtailed at any time a railroad desires to escape liability therefor through the pretext of discharging that employee allegedly "for cause".

By artful use of the suspension/discharge machinery, a railroad will be able to prevent a jury from ruling upon significant elements of damages present in virtually all FELA cases by confining a plaintiff the administrative procedures of the Railway Labor Act in clear contravention of the above cited federal statutory and decisional law.

For the above stated reasons, this Court should issue grant the Writ of Certiorari and reverse the decisions of the Georgia courts summarily or should set this case for briefs and argument.

Respectfully submitted,

LAW OFFICES OF BILLY E. MOORE

BY: _____
BILLY E. MOORE
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE ON APPELLEE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served the foregoing Petition for Certiorari upon Central of Georgia Railroad Company, Respondent, by mailing copies of the same properly addressed, postage prepaid, to Mr. Ellsworth Hall, Jr.; Mr. John B. Miller; Mr. Bert DeRieux; and Mr. Hugh M. Dorsey, Jr.; attorneys of record for Respondent Central of Georgia Railroad Company.

This 15th day of October, 1982.

BY: _____
BILLY E. MOORE

Attorney for Thurman H. Howard, Petitioner

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232 Ga. 511, 518-19 (207 SE2d 494) (1974). However, the defendant's request to charge on this offense included this information and he cannot complain that the court gave information he requested.

6. Defendant's remaining two enumerations of error do not merit discussion.

Judgment affirmed. All the Justices concur.

DECIDED JULY 8, 1982—
REHEARING DENIED JULY 22, 1982.

Murder. Cobb Superior Court. Before Judge Williford, Senior Judge.

Greene & Davis, Laurie C. Davis, Darrell Greene, Patrick H. Head, for appellant.

Thomas J. Charron, District Attorney, Michael J. Bowers, Attorney General, Nicholas G. Dumich, Assistant District Attorney for appellee.

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PER CURIAM.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated.

All the Justices concur, except Smith and Gregory, JJ., who dissent, and Jordan, C. J., who is disqualified.

DECIDED JULY 8, 1982 —
REHEARING DENIED JULY 22, 1982.

Certiorari to the Court of Appeals of Georgia — 161 Ga. App. 560 (288 SE2d 347) (1982).

Billy E. Moore, J. Sherrod Taylor, Jack T. Brinkley, Jr., Frank J. Jordan, for appellant.

Ellsworth Hall, Jr., John B. Miller, Burt DeRieux, for appellee.

Kenneth M. Henson, Jr., Allen Post, Hugh M. Dorsey, Jr., amici curiae.

SMITH, Justice, dissenting.

Appellant Thurman Howard brought this action under the Federal Employers' Liability Act (FELA), 45 USCA § 51 *et seq.*, and the Safety Appliance Act, 45 USCA §§ 2, 5, and 8, to recover for back injuries he sustained in a railroad collision. The case was tried before

a jury, which returned a judgment of $565,602.23 in Howard's favor. On appeal, the Court of Appeals reversed. *Central of Ga. R. Co. v. Howard,* 161 Ga. App. 560 (288 SE2d 347) (1982). It held that the trial court should have granted the railroad's motion for a mistrial because of the introduction of "grossly prejudicial" and irrelevant evidence at trial, as well as "abominably inflammatory" remarks by Howard's counsel.[1]

We granted certiorari to consider "whether the dismissal of Howard by the railroad was relevant to the issues of disputed lost wages and/or future employability." Inasmuch as I believe that the evidence of Howard's dismissal was properly admitted, I respectfully dissent from the denial of appellant's motion for rehearing.

Howard, a locomotive engineer, was injured on July 1, 1978 when, because of a broken coupling, his engine collided with another train. As a result of the accident, Howard experienced lower back pain and was from time to time unable to work. In July of 1980, some two years after the accident, Howard was dismissed by the railroad following an incident in which he got off his engine and fired a .22 rifle at a tree on Union Camp property.[2] He did this while giving his back a rest during a work break. Howard admits that he fired the rifle, but he contends that the railroad used the disciplinary violation as a pretext for firing him. The company's real motive, he contends, was to reduce its liability for lost wages in his pending FELA action. Howard appealed the discharge through administrative channels, and in February of 1980, several days before the trial of this case, he was reinstated as an engineer without back pay.

It is important to remember that at the time of his dismissal, Howard was not able to work because of the injuries he suffered in 1978 while employed by the railroad. At trial, he contended that the sole reason for his dismissal was his previous injury and that the railroad "fired" him in order to escape payment of the approximately $11,000 in wages due him during the period from his firing until the

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[1] Based on my review of the record in this case, I think the Court of Appeals erred when it reversed the trial court's denial of the railroad's motion for mistrial. The settled rule in Georgia is that the trial court has broad discretion when passing upon such a motion, and its ruling should not be disturbed absent a manifest abuse of discretion. *J. W. Starr &c. Co. v. York,* 89 Ga. App. 22 (3) (78 SE2d 429) (1953). I find no such abuse of discretion in this case. Therefore I would reverse the Court of Appeals.

[2] A letter dated July 30, 1980, and addressed to the appellant from his supervisor Cogdell, stated that Howard was ". . . . dismissed from the services of the Central of Georgia Railroad Company, effective immediately." It directed Howard to turn in all company property in his possession. At trial Cogdell testified that, at his level at least, Howard's dismissal was final.

trial. Thus Howard urges that the wrongfulness of his dismissal is not at issue here; rather, he argues, a jury question exists as to the effect of the discharge upon his right to recover damages for lost wages and future employability. Therefore the evidence introduced at trial was relevant to damages issues in the case. I agree, and would hold that evidence touching on these issues was properly admitted at trial.

The issues in this case are controlled by federal, not state, law. Questions of damages in FELA actions are federal in nature, even where the action is brought in state court. Norfolk & Western R. Co. v. Liepelt, 444 U. S. 490 (100 SC 755, 62 LE2d 689) (1980). Carriers are liable to their employees under the Act for expenses, loss of time, suffering, and diminished earning power. Michigan Central R. Co. v. Vreeland, 227 U. S. 59 (33 SC 192, 57 LE 417, ...13). In a Georgia case construing the FELA, the court in *Pollard v. Gammon*, 63 Ga. App. 852, 864 (12 SE2d 624) (1940), held that evidence concerning one's earning capacity after an injury is admissible.

Thus federal law dictates that Howard, when proving his damages at trial, had a right to introduce evidence bearing on the issues of loss of work time and diminished earning capacity after the accident. As to loss of time, there existed a genuine question of fact whether Howard was fired to avoid liability under the FELA for the $11,000 in wages he lost between the dismissal and trial, or whether the dismissal was genuinely motivated by disciplinary reasons so that no back pay was due him. This, it seems to me, is a jury question; and Howard's proffered evidence of past retaliatory discharges by the railroad was highly relevant to that question. As to diminished earning capacity, surely a jury could logically conclude that a dismissal would affect Howard's future employability. If the jury believed that Howard was dismissed by the railroad solely because of his injury, they were authorized to find that the railroad would probably dismiss him again on such basis and that Howard's capacity to work, as an element of his future wages, was greatly diminished. Therefore, the jury could find that Howard would not be able to find work paying as much in salary in the future as he was making before his injury and dismissal.

The evidence on this question was properly admitted. See Moore v. Chesapeake & Ohio R. Co., 493 FSupp. 1252 (D.C. W. Va. 1980).

An independent source of relevancy of Howard's evidence of the railroad's alleged misconduct is found in the FELA itself. 45 USCA § 55 prohibits "[a]ny contract, rule, regulation, or *device* whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter . . ."

(Emphasis supplied.) Evidence concerning the railroad's dismissal of Howard, together with evidence of alleged past firings of employees who asserted their rights under the FELA, was relevant to a possible violation of this statute. In my opinion, the jury in this case was entitled to have full evidence on the matter to determine whether the railroad used its dismissal powers as a "device" to avoid liability for lost wages in contravention of 45 USCA § 55. Howard's proof on this issue was not directed to any "wrongful discharge" as such, but to a plan, scheme, or "device" by the railroad to deprive him of lost wages.

Because it was relevant to the issue of lost wages, evidence establishing the fact that the railroad had and would dismiss anyone suing them was properly admitted. The Court of Appeals was wrong to hold otherwise. In Hendley v. Central of Ga. R. Co., 609 F2d 1146 (5th Cir. 1980) the Court recognized and dwelled at length on the intimidating effect of the railroad's power against a FELA witness. In the Hendley case, the railroad (the same railroad that is the Appellee here) suspended Hendley for aiding a fellow employee in a FELA claim. Certainly, it was in order for Howard to offer evidence of Hendley's suspension in this case in view of his contention that the railroad dismissed him, not for any rule violation, but simply because he was not working due to an injury sustained while working for the railroad. Howard had missed about half of his working days since the injury in 1978. Under Hendley, Howard had the right to show the actions of the railroad in the past to illustrate what their real intentions were in dismissing him.

The Hendley court stated that if employees can show that the object of a railroad's investigation is to discipline the employee for furnishing information in a FELA case, then injunctive relief by a federal district court is " 'appropriate if not compelled.' " Id. at 1152. If this is so, certainly it is proper to allow a plaintiff in a FELA action to produce evidence tending to prove uncalled-for discipline by an employer, then to allow a jury to pass upon the question.

This Court in criminal cases allows evidence of prior crimes committed by the defendant to show motive, intent, scheme, and bent of mind. I believe that the situation in the case of Howard is analogous.[3] He should be allowed to prove the actions of the railroad in a prior case to illustrate the company's motive, intent, scheme, or bent of mind in its dealings with employees. The Hendley court at

[3] 45 USCA § 60 makes it a crime for a common carrier to "prevent employees . . . from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee . . ." See Hendley v. Central of Ga. R. Co., 609 F2d 1146, 1150 (5th Cir. 1980).

page 1152 (10) says as much. Again, this matter of past and future loss of earnings is one that is commonly litigated under the FELA, as well, as in other damages cases. See *Dilliplane v. Henderson*, 141 Ga. App. 684 (234 SE2d 357) (1947); *City Council of Augusta v. Drawdy*, 75 Ga. App. 543 (43 SE2d 569) (1947); Missouri Pac. R. Co. v. Cunningham, 515 SW2d 678 (1974); Moore v. Chesapeake and Ohio R. Co. 493 FSupp. 1252 (D.C. W. Va. 1980).

The decision of the Court of Appeals appears to have overlooked these cases in its opinion in *Central of Ga. R. Co. v. Howard*, 161 Ga. App. 560 (288 SE2d 347) (1982). There was no mention in the opinion of the relevancy of lost wages and future employability.

Appellee railroad argues that even if the evidence of Howard's dismissal was relevant to the damages issues in the case, the evidence was erroneously admitted because Howard's exclusive remedy was to initiate an administrative review procedure under the Railway Labor Act, 45 USCA § 151 et seq. I cannot agree. In my opinion there is ample case authority for allowing Howard to introduce evidence of his dismissal in the present case.

In Alexander v. Gardner-Denver Co., 415 U. S. 36 (94 SC 1011, 39 LE2d 147) (1974), the Court held that an employee asserting a Title VII employment discrimination claim was not bound by a prior arbitration hearing which resulted in a finding adverse to the claimant. The Court stressed that where there exists a federal right independent of the right to an administrative appeal, the employee was entitled to proceed under the independent substantive law. I think that the rationale of Alexander extends to the present case.

Like the plaintiff in Alexander, Howard sought to have his claim for lost wages reviewed in his request for reinstatement under the arbitral provisions of the Railway Labor Act. Since the railway resisted Howard's claim for back wages in the arbitration proceedings, the burden was on Howard during trial of the present case to show that the $11,000 lost wages resulted from his back injury. Howard's claim for back pay is an element of his damages under the FELA, and is separate and distinct from any arbitration remedies he may have. In the Alexander case, the court held that "[t]he distinctly separate nature of these contractual [i.e., in this case, arising under the Railway Labor Act] and statutory [i.e., in this case, arising under the FELA] rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U. S. at 50. Howard should be allowed to pursue each and every element of his lost wages claim in this proceeding, unencumbered by the prior administrative proceeding. Furthermore, as the Supreme Court held in Alexander, evidence of the arbitral decision should be "admitted . . . and

accorded such weight as the court [here, the jury] deems appropriate." 415 U. S. at 60.

As a practical matter, appellee's argument is that a railroad could use a disciplinary violation as a pretext for discharging an injured employee who could not work because of a FELA injury and that this discharge would effectively cut off all rights to future lost wages as well as the right to be compensated for inability to work and earn a living under the FELA. The appellee would require a discharged employee to appeal to the National Adjustment Board in all cases. However, appellee overlooks the fact that an appeal to an administrative board under the Railway Labor Act in a case such as this one would be futile, as no administrative board would have the power to order a person who could not work reinstated, much less order a railroad to pay back wages to someone who was not in fact able to work. In my opinion, such a position restricting the scope and coverage of the FELA violates the spirit of 45 USCA § 55, which prohibits any "contract, rule, regulation, or device" to defeat "any liability" under the FELA.

The United States Fifth Circuit Court of Appeals has implicitly rejected the railroad's argument in Brotherhood of R. Trainmen v. Central of Ga. R. Co., 305 F2d 605 (5th Cir. 1962); Yawn v. Southern R. Co., 591 F2d 312 (5th Cir. 1979) and Hendley v. Central of Ga. R. Co., 609 F2d 1146, supra, holding in each case that matters arising under Congressional Acts of the United States (including the FELA in Yawn and Hendley) must proceed under such Acts in courts of law and are not subject to administrative action under the Railway Labor Act. The petitioner's claim for lost wages following his injury on July 1, 1978, is a distinct element of damages under this FELA cause of action. In order to prove his lost wages and his loss of ability to work, it was necessary for Howard to place into evidence the circumstances surrounding his discharge and his status at the time of the discharge.

A final matter to be addressed is the portion of the Court of Appeals opinion concerning the argument of appellant's counsel. If, as I contend, Howard's dismissal was relevant to the issue of lost wages and future employability, then remarks of his counsel would be authorized by *Seaboard C. L. R. Co. v. Towns,* 156 Ga. App. 24 (274 SE2d 74) (1980). "'While counsel should not be permitted in argument to state facts which are not in evidence, it is permissible to draw deductions from the evidence; and the fact that the deductions may be illogical, unreasonable, or even absurd, is a matter for reply by adverse counsel, and not for rebuke by the court.'" *Miller v. Coleman,* 213 Ga. 125, 130 (97 SE2d 313) (1957). This matter is well settled in Georgia law. *Owens v. State,* 120 Ga. 209 (47 SE 545) (1904).

In this matter of argument by counsel, the court in *Western & A. R. Co. v. York*, 128 Ga. 687, 689 (58 SE 183) (1907) said: "We do not think the remarks of counsel were of such character as to require the court to declare a mistrial . . . [i]t is not impassioned oratory which the law condemns and discredits in the advocate, but it is the introduction of facts not disclosed by evidence, which requires the judge to use his power of declaring a mistrial." This Court has been most liberal when reviewing counsel's arguments to the jury. In a recent case, *Hines v. State*, 249 Ga. 257 (290 SE2d 911) (1982), this court affirmed the trial court's denial of a motion by Hines for a mistrial. The ground for the motion was that the District Attorney in his closing argument stated that the state's witness was "perhaps even putting his life in danger." There was *absolutely* not one iota of evidence that the state's witness' life was in danger, yet we allowed it to stand. In *Howard*, the evidence authorized the argument and the Court was present during argument. In my opinion, the trial court is the best judge as to what was prejudicial and was not. We should defer to its judgment absent a manifest abuse of discretion.* There was no such abuse of discretion in this case.

Furthermore, the trial court, in its instructions to the jury, repeatedly admonished that damages due Howard, if any, could be only those suffered "as a result of his injury." Thus it appears that the evidence of the dismissal was strictly limited to its relevance on the issues of lost wages and future employability.

In conclusion, it can be seen that the railroad's denial of lost wages may well have resulted from Howard's back injury, rather than from a disciplinary violation as the railroad contends. The evidence of the discharge therefore was highly relevant and probative on the issues of lost wages and future employability, and was properly admitted by the trial judge. The railroad's "dismissal" of Howard was, I believe, no more than a "device" to cut off compensation and was clearly in contravention of 45 USCA § 55, which prohibits the use of such a "device."

For all of the above reasons, the decision of the Court of Appeals should be reversed and the judgment of the trial court, which was based upon a jury verdict, should be reinstated.

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* See note 1 supra.

discovery. However, the notice served on appellant clearly indicated that the document examiner was to be deposed as a *witness*. Therefore, we hold that the requirements of Code Ann. § 81A-126 (b)(4)(B) did not apply and there was no necessity that appellee show exceptional circumstances to authorize the taking of the deposition.

B. Appellant also argues that the admission into evidence of the deposition was error because the deposition was not signed by the witness and appellant did not waive the signing by the witness. Code Ann. § 81A-130 (e) provides that a deposition shall be submitted to the witness for examination and shall be signed by the witness. The only statutory exceptions to the signing requirement are when the witness is ill, or cannot be found, or refuses to sign, or when "the parties by stipulation waive the signing..." Code Ann. § 81A-130 (e). In this case, the certificate of the court reporter recited that signing of the deposition was waived, but it appears on the record that there was no appearance for the defendant. Furthermore, counsel for appellant filed objections to the deposition and expressly denied having waived the signing requirement. Appellant's objections were timely filed and should not have been overruled. It follows that the admission of the deposition into the record was error.

However, we do not find the error to require reversal under the circumstances of this case. Another questioned document examiner testified to the same conclusions reached by the deponent. That testimony was admitted without objection. That being so, the error in admitting the evidence was harmless. *Converse v. O'Keefe*, 148 Ga. App. 675 (2) (252 SE2d 92).

Judgment affirmed. Birdsong and Sognier, JJ., concur.

DECIDED FEBRUARY 23, 1982—
REHEARING DENIED MARCH 10, 1982 — CERT. APPLIED FOR.

Action for rent, etc. Walker Superior Court. Before Judge Painter.

Frank M. Gleason, John W. Davis, Jr., for appellant.

W. Ralph Hill, W. Ben Ballenger, for appellee.

62981. CENTRAL OF GEORGIA RAILROAD COMPANY v. HOWARD.

BIRDSONG, Judge.

Appellant Central of Georgia Railroad Co. (Railroad) appeals a jury verdict awarded to the appellee in this suit. The appellee, a locomotive engineer, allegedly sustained injury when he was thrown from the engineer's seat onto his buttocks on the "catwalk" of the

engine when, because of a broken coupling, his train cars collided with other train cars. Appellee's complaint contained the following allegation: "This action is brought under and by virtue of the provisions of the Federal Employers Liability Act, 45 U.S.C.A. § 51 et seq., and the Safety Appliance Act, Title 45, U.S.C.A. § 2, § 5, and § 8, and particularly that part that deals with automatic couplers." *Held:*

1. The Railroad admitted absolute liability in the case under the Safety Appliance Act; therefore, the only issues at trial should have been whether, and to what extent, the accident proximately caused the appellee's alleged injuries. Over repeated and continuing objection by the defense, and with the approval of the trial court, the appellee devoted nearly half of the trial proceedings to the vilification and calumniation of the Railroad corporation and, in particular, of Mr. Codgell, the chief operating officer in charge of railroad operations for Atlanta, Savannah and central Georgia. Part of the stated objective in all this was to show that the Railroad had, on account of the appellee's suit for injury, harassed the appellee by firing him (the evidence shows that some two years after the injury the Railroad fired the appellee for having discharged a .22 rifle on Union Camp property; the appellee left his train and shot bullets into a pine tree in an occupied area of Union Camp property), and hence to claim mental anguish damages based on this alleged harassment and some $11,000 as wages lost before the Railroad reinstated the appellee. In the main however, the appellee with the trial court's approval and over objection, sought to establish the credibility of certain witnesses, also Railroad employees, by showing that they were afraid of Mr. Codgell, who was present in the courtroom, because one of these witnesses (Hendley) had allegedly previously been fired by Mr. Codgell for testifying in favor of another railroad employee in an injury suit against the Railroad.

All of this matter was irrelevant to the issues under trial. The credibility of these witnesses, who were called by the plaintiff Howard as adverse witnesses, was never impeached or impugned by the appellant Railroad in any way. In fact, as appellee's counsel said in closing argument, despite the "pressure these men were under that came in here to testify for Sonny Howard when their supervisor was sitting back there. . .*nevertheless they came in and told the truth.*" None of these witnesses denied that Howard had been injured. The witness Hendley, who had allegedly been fired for testifying in favor of another injured employee, stated under leading questioning of appellee's counsel that he was apprehensive, afraid and nervous about "being in this courtroom [because] a similar situation arose approximately three years ago when I was called to be a witness. I

subsequently lost my job over it. [This man (Codgell) sitting here in their chair is the one that fired me. I had to stay out of work sixteen months.]" The "frightened" Hendley then proceeded to give a detailed description of the appellee's back and neck pain, debilitation and deterioration which he had observed. To another witness, who did not testify unfavorably to the appellee, appellee's counsel queried: "I notice that you're a little nervous. The man writing notes back here, grey hair, he's your boss, ain't he? [Objection overruled.] You see all this paper he's got back here and he's been writing on these notes. You see that paper laying in front of him? [Yes.] That's your boss that's writing these notes, is it not? [Yes.] That's Mr. W. D. Codgell. He's the man that signs these letters, 'Arrange to turn in all the company property in your possession. . . .' He's the one that signs these kinds of letters, isn't he? [I don't know, I never received one.] You ain't? [No.] Don't count on not receiving one. You know what he's putting on his list back there? Making a list and checking it twice, getting ready for you? [No, I don't.] But you do know that he had fired folks in the past? [Yes.] And you do know that he's fired people for coming into court and helping other people in [injury] cases, don't you? [Objection: That's inconsistent with the facts, Your Honor]. . . . You do know that they fired Jimmy Hendley. . . . That man right there is the man who done it, wasn't he? [Yes.] But you come in here to tell the truth, didn't you, Mr. Hall? [Yes.] And you're going to do it. . . no matter what he does and no matter what list he's making back here, is that correct?" To the third witness, appellee's counsel asked: "Are you afraid of Mr. Codgell? [No, sir.] You're not? [No.] Well, don't you know that he fired Jimmy Hendley for appearing in a liability case?" Objection was made but counsel for appellee Howard insisted this questioning was necessary to establish the credibility of these witnesses, to show they "have a reason to be afraid . . . and if his answers don't come out just right across the line, that this jury's got a right to know why they're not down the line, that he's concerned about his job . . . [I]n fact even if he tells it just like it happened, the jury can look at this man and know that he came down here under duress of losing his job and told the truth. . . . I want to show why the jury ought to believe him and they ought to believe Mr. Howard." Ultimately, the court permitted counsel to question this witness at length about fear of testifying and being fired.

The evidence allegedly intended to show these witnesses' fear, was not admissible to support these witnesses' veracity, and would not be admissible even if their testimony had conflicted with other evidence offered in support of the appellee. *Anderson v. Southern R. Co.*, 107 Ga. 500, 506 (33 SE 644); *Vernon v. State*, 49 Ga. App. 187, 191 (174 SE 548). Even if the appellant had attacked the credibility of

these witnesses, evidence of their alleged fear of the appellant would not have been admissible because they did not testify favorably to the appellant, and the appellee was not entitled to introduce any evidence in support of their credibility (*Anderson*, supra; *Vernon*, supra). The irrelevant evidence was grossly prejudicial to the appellant and, moveover, was presented in such a manner as to exaggerate its prejudice far beyond any merit it might in other circumstances have had. It was error to permit it.

2. The conduct of this trial contained such extensive and grossly improper prejudicial remarks directed at the appellant, that it is impossible for us to say the verdict was not infected with undue bias (Code Ann. § 105-2015). In opening statement, counsel for the appellee stated that because he was fired for discharging a weapon on a customer's property, the appellee "got the idea he was being railroaded" and hired counsel to represent him; that Mr. Codgell was the Railroad's "hatchet man," and "I'll state in my place that if [a] man testifies on behalf of the railroad, he's scared half to death [that he will be fired]." After mild admonition by the trial court, the attorney said: "I apologize for [calling Mr. Codgell] a hatchet. I did not mean that he had . . . a hatchet and went around cutting people with it. I [meant] he's the man that pulls the strings for hiring and firing . . . he is here for the purpose of if one of these witnesses. . . they are afraid. [Objection overruled.] When they sit down up here and say 'I'm a railroad man' and they say, 'Yes, I'm a friend of Sonny Howard,' you keep in mind that their job is on the line because they got the man who controls that particular aspect of their lives. They're going to tell you they're afraid of him. I agree with [counsel for defendant] that [the Railroad does] have a right to a representative [in court]. But . . . Mr. Codgell ain't been at not one of these depositions. He's their man in court and you figure out why he's here . . . What does this $11,084.93 [for lost wages] represent. . . . Well, let me tell you about that. This may be one of them prejudicial things, I don't know. It's something they did, if it's prejudicial, they done it. Last year Sonny Howard was working out here at Union Camp [switching train cars]. Sonny's back was bothering him, so he gets down off the engine . . . went to his car [and took a .22 rifle from the trunk and] shot it a few time to the tree . . . he lost his job. . . . He told them . . . that's what you're doing it to me for because I've been off with my back . . . they were after him . . . that man sitting right there in this courtroom was after him. . ."

The appellee testified that after he was injured Mr. Codgell harassed him by calling an investigation and firing him because of the shooting incident. Appellee's counsel fully explored the alleged firing of Mr. Hendley for helping another employee in an injury case, even

referring to a $300,000 settlement paid by the Railroad to settle Mr. Hendley's claims; he asked Mr. Codgell if the Railroad had violated criminal statutes in Mr. Hendley's case, and if he knew Mr. Hendley had a wife and three kids, one of whom was retarded, and whether Mr. Hendley's wife should be proud of Mr. Hendley.

In closing argument, one of appellee's counsel stated that no matter "how big a company is, how much money it's got how . . . powered a lawyer they can hire," the individual has a right to a fair shake; that appellant was "a very wealthy company" and that to the corporation a jury verdict was nothing more than an entry of an "X" in the account books, but Sonny Howard has no ledger to make an entry on; that "apparently [Mr. Codgell's] only participation as far as the trial is concerned was to be here. You know there's a lot of people who have a Sunday School face and a Saturday night mind.... You've heard the expression hard ball? You've never seen a hard ball in your life until you start moving against big companies like this . . . thank the Lord for people like [appellee's lead counsel] who is willing to take them on. He's not going to bow and scrape to them. He's going to represent his people. You now have an opportunity to represent the interest of this individual now...." Appellee's lead counsel then said: "Sonny Howard . . . has faced a lot of persecution and opposition . . . Jimmy Hendley supplied me with the greatest day that I'll ever realize in the law profession. He permitted me to represent him in the most hideous and atrocious action that has ever been brought against any individual in this modern world [and] the reason Jimmy Hendley's situation was brought into this court was to go straight to the credibility of these people that come in here and testified . . . if you don't have anything to lose it's easy to . . . testify. But when somebody has that baseball bat over your head and will knock a knot upside your head that big . . . you can believe what [these] people say that come into court . . . because Mr. Codgell fired him.... Whenever you go any place, even the man that has done you the dirtiest, the low downdest thing that ever happened to you, takes the stand, the best that he can say . . . loyal, honest, good family man, but you fired him, didn't you . . . it tells you something about the quality of a man that would do that . . . I shed tears the day that Fifth Circuit Court . . . said [to the Railroad] you are a law violator, you mistreated the loyal family man. [About the shooting incident], seems like Mr. Codgell and Union [Camp] got something going out there.... [the appellee] felt that he was [fired because of his injury] and you people can conclude that he was.... these letters [of dismissal for firing a gun on customer's property] is as cold blooded as you'll ever read. They don't say, 'Mr. Howard we're giving you fifteen days to think this thing over and be sure you don't do it no more'.... [Mr. Howard admitted he

shot the gun] and that was just the honesty that got him [shot] right between the eyes. They just took the .22 rifle and turned it around on him and blew his brains out as hard as they could.... How humiliated would you be? This is the most degrading and loathful thing that can happen to anybody... It wasn't degrading to this southern gentleman [Codgell] ... and it don't make any difference if this railroad has to spend out ten million dollars ... [Mr. Codgell will] still have his job because he is a white collar man.... 'I just shot three folks, I just took three people's jobs away from them, but I'm doing well.' Don't you think [fifteen days suspension] would have been enough with a guy saying, 'I'm sorry, I'm sorry, I'm sorry. Don't whup me, don't whup me no more. Don't hit me no more. I won't do it, I do it no more.'" And on and on.

The arguments of counsel and the injection of irrelevant material were so abominably inflammatory and prejudicial that it is impossible to say the verdict was unaffected thereby. The only issues in this case were whether and to what extent the train accident proximately injured the appellee. Even if the appellee had been wrongly and injuriously fired not because he fired a weapon on the job but because he had lost work time and made personal injury claims against the Railroad, this is clearly not an injury proximately caused by the train accident and is not a matter addressable in this proceeding. It is irrelevant. The remarks and evidence concerning this and Jimmy Hendley's firing and the witnesses' fear of testifying were inadmissible and irrelevant. They served only to engender prejudice against the appellant Railroad as being a powerful wealthy monolith which, with the help of its evil servant Mr. Codgell, continuously browbeats its employees, commits vicious criminal acts against the ordinary working man and does the "dirtiest, the low-downdest" things to the loyal family man. Appellee's counsel even strongly suggested to the jury that this case was their chance to stand up to the Railroad and punish its villainy. The language and irrelevant evidence used "was so calculated to prejudice the jury against [the] railroad [company], that it is extremely doubtful if its injurious effects could have been cured by any rebuke of the court or by any instructions to the jury. A mistrial was the only remedy." *Southern R. Co. v. Gentle*, 36 Ga. App. 11, 13 (135 SE 105). The case is reversed. See esp. *Georgia Power Co. v. Puckett*, 181 Ga. 386 (182 SE 384); *Western &c. R. Co. v. Cox*, 115 Ga. 715, 717 (42 SE 74).

Judgment reversed. Shulman, P. J., and Sognier, J., concur.

DECIDED FEBRUARY 26, 1982 —
REHEARING DENIED MARCH 10, 1982 — CERT. APPLIED FOR.

Action for damages. Chatham Superior Court. Before Judge

Gadsden.

J. B. Miller, for appellant.

Billy E. Moore, John F. Cameron, John Wright Jones, J. Sherrod Taylor, for appellee.

63068. SOLOMON v. THE STATE.

SHULMAN, Presiding Judge.

Appellant attacks the sufficiency of the evidence presented against him in his trial for burglary of the Perry School Annex, a building occupied by the Houston County Board of Education. Finding the evidence sufficient to support this conviction, we affirm.

Police officers discovered appellant crouched behind one of the school's air conditioning units. Contrary to appellant's assertion, this is not a case where appellant was convicted solely on evidence of his presence at the scene of a crime (compare *Sweat v. State,* 119 Ga. App. 646 (168 SE2d 654)), since another suspect, captured as he fled the school building, testified for the state at appellant's trial and identified appellant as a member of the quartet which broke into the school building. Under Code Ann. § 38-121, the testimony of one witness is generally sufficient to establish a fact except in a felony case where the witness is an accomplice. In such a case, there must be independent corroborative evidence which tends to connect the accused with the crime. *Adams v. State,* 140 Ga. App. 621 (231 SE2d 547). Appellant's timely presence at the scene of the crime and the circumstances of his discovery there are sufficient corroboration of the accomplice's testimony and, taking the evidence as a whole, we conclude that a rational trier of fact could have found appellant guilty of burglary beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560).

Judgment affirmed. Birdsong and Sognier, JJ., concur.

DECIDED FEBRUARY 25, 1982 —
REHEARING DENIED MARCH 10, 1982.

Burglary. Houston Superior Court. Before Judge Hunt.

Harry J. Fox, Jr., for appellant.

Theron Finlayson, District Attorney, James F. Garnett, Assistant District Attorney, for appellee.

IN THE SUPREME COURT OF GEORGIA

THURMAN H. HOWARD,	*	
	*	
Appellee-Plaintiff,	*	
Petitioner in	*	SUPREME COURT
Certiorari,	*	CASE NO. 38626
	*	
vs.	*	
	*	
CENTRAL OF GEORGIA	*	
RAILROAD COMPANY,	*	COURT OF APPEALS
	*	CASE CASE NO. 62981
Appellant-Defendant,	*	
Respondent in	*	
Certiorari,	*	

NOTICE OF PETITION FOR CERTIORARI TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thurman H. Howard, Petitioner in the above-stated case, hereby petitions to the Supreme Court of the United States from the judgment of the Supreme Court of Georgia, as revised and entered July 22, 1982, and in which Petitioner's Motion for Rehearing was denied by the Supreme Court of Georgia on July 22, 1982. This Notice shall form a part of Thurman H. Howard's petition for the writ of certiorari to the Supreme Court of the United States to review the said judgment

of the Supreme Court of Georgia and the judgment of the Court of Appeals of Georgia.

The judgment of the Supreme Court of Georgia was a final judgment vacating certiorari review of the judgment of the Georgia Court of Appeals and which reversed a jury verdict and judgment in favor of Thurman H. Howard ordering and adjudging that Thurman H. Howard recover of Central of Georgia Railroad Company the sum of Five Hundred Sixty Five Thousand Six Hundred Two Dollars and 23/100 ($565.602.23) with interest thereon at the legal rate and his costs of the action.

The Clerk of the Court of Appeals of Georgia, which Court is possessed of the record, will omit nothing from the record on appeal in that Court, including the transcript of evidence and proceedings filed for inclusion in the record on appeal, and said Clerk of the Court of Appeals of Georgia is requested to certify said record and provide for its transmission to and filing with the Clerk of the Supreme Court of the United

States.

The Supreme Court of the United States has jurisidiction over this matter under 28 U.S.C.A., §1257(3).

Dated: October 15, 1982.

LAW OFFICES OF BILLY E. MOORE

BY: _____
BILLY E. MOORE

ATTORNEY FOR THURMAN H. HOWARD, PETITIONER

233 12th Street
P. O. Box 2565
Columbus, Georgia 31902
(404) 323-3691

IN THE COURT OF APPEALS OF GEORGIA

THURMAN H. HOWARD,	*	
	*	
Appellee-Plaintiff,	*	
Petitioner in	*	
Certiorari,	*	SUPREME COURT
	*	CASE NO. 38626
	*	
vs.	*	
	*	
	*	
CENTRAL OF GEORGIA	*	
RAILROAD COMPANY,	*	COURT OF APPEALS
	*	CASE CASE NO. 62981
Appellant-Defendant,	*	
Respondent in	*	
Certiorari,	*	

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THURMAN H. HOWARD,

Petitioner

v.

CENTRAL OF GEORGIA RAILROAD COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Savannah, GA 31402

November 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that errors by the trial court in admitting evidence and in permitting inflammatory and prejudicial remarks by petitioner's counsel required reversal of its judgment.

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IN THE

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OCTOBER TERM, 1982

No. 82-670

THURMAN H. HOWARD,

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CENTRAL OF GEORGIA RAILROAD COMPANY,

*Respondent**

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 161 Ga. App. 560, 288 S.E.2d 347, and appears in the Appendix to the petition at A8-A13. The *per curiam*

* The listing of parent, subsdiaries and affiliates required by Rule 22.2 is as follows:

Southern Railway Company (parent)
Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company

memorandum of the Supreme Court of Georgia and an opinion dissenting from denial of rehearing are reported at 249 Ga. 713, 293 S.E.2d 346, and appear in the Appendix to the petition at A1-A7.

JURISDICTION

The decision of the Supreme Court of Georgia vacating its grant of certiorari was entered on July 8, 1982, and

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Beaver Street Power Company
Carolina and Northwestern Railway Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cincinnati Southern Railway
1575 Eye Street Associates
High Point, Randleman, Asheboro and Southern Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Corporation
The North Carolina Midland Railroad Company
The North Carolina Railroad Company
North Charleston Terminal Company
Pine Brook Center Limited
Queen City Developers
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
700 North Fairfax Street Limited Partnership
The South Western Rail Road Company
State University Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Woodstock & Blocton Railway Company
Yadkin Railroad Company

rehearing was denied on July 22, 1982 (Pet. App. p. A1). The petition for certiorari was filed on October 15, 1982. Jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATEMENT

This action was begun by petitioner to recover for a personal injury under the Safety Appliance Act (45 U.S.C. §§ 2, 5, 8) and the Federal Employers Liability Act (45 U.S.C. §§ 51 *et seq.*). Petitioner, a locomotive engineer, was thrown from his seat onto his buttocks on the catwalk of his engine when a coupling broke and caused his train to collide with other cars. Under the Safety Appliance Act, proof of the fact that an appliance failed is proof of liability for any injuries proximately resulting from such failure. *O'Donnell* v. *E. J. & E. Ry. Co.*, 338 U.S. 384 (1949). The failure was admitted, leaving for the jury only whether the violation was a proximate cause of the injuries, and, if so, what damages should be awarded.

However, at the trial, counsel for petitioner, over continuing objections by respondent's counsel, devoted much of the time to vilification of respondent and Mr. Cogdell, its chief operating officer. Some time after the accident petitioner had been discharged by Mr. Cogdell for leaving his train and firing a .22 rifle on the property of an industry served by respondent (he was later reinstated, without back pay). Referring to this fact, and to the case of another employee who had allegedly been discharged for testifying against respondent in another F.E.L.A. action, counsel for petitioner repeatedly "cross-examined" his own employee witness to show that they were, or should be, afraid of Mr. Cogdell.

Petitioner's counsel, over objections, also indulged in what the Court of Appeals characterized as "abominably

inflammatory and prejudicial" argument. A sampling is contained in the Court of Appeals' opinion (Pet. App. pp. A11-A13), and need not be repeated here.

On the basis of the irrelevant and prejudicial material which the trial court had permitted to be introduced, and the inflammatory and prejudicial arguments of petitioner's counsel, the Court of Appeals reversed the judgment which had been entered on the jury verdict against respondent in the trial court (Pet. App. p. A13). After a petition for rehearing had been denied *(ibid.)*, petitioner filed a petition for a writ of certiorari to the Georgia Supreme Court. The Supreme Court granted the writ, indicating particular concern with the question "whether the dismissal of Howard by the railroad was relevant to the issues of disputed lost wages and/or future employability," but after plenary consideration it issued a *per curiam* opinion vacating the grant as not satisfying its criteria for certiorari ("cases of great concern, gravity and importance to the public" (Rule 28, Rules of Supreme Court of Georgia)) (Pet. App. p. A1). Rehearing was denied on July 22, 1982 *(ibid.)*.

REASONS FOR DENYING THE WRIT

This case utterly fails to satisfy the requirements justifying the grant of a petition for certiorari to a state court as set forth in Rule 17.1(a) and (b). It presents no conflict of decisions with any other court, and indeed raises no question of federal law.

1. The first of petitioner's assertions (Pet. pp. 6-7), that the court below refused to follow federal law as to damages bears no relation to the facts. At no time has there been any challenge to the well-settled principle referred to by petitioner that the measure of damages in a case such as this brought under federal statutes is a

matter of federal law. *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980).

2. Petitioner's second contention (Pet. pp. 7-11), relates to the conclusion of the court below that petitioner's discharge for firing the .22 was irrelevant and prejudicial. Admissibility of evidence and prejudicial material are matters of state practice and procedure and raise no federal question just because the state court is enforcing a federal statute. *Second Employers' Liability Cases*, 223 U.S. 1, 56-57 (1912); *Central Vermont Ry.* v. *White*, 238 U.S. 507 (1915); *Minneapolis & St. Louis Ry.* v. *Bombolis*, 241 U.S. 211 (1916).

In any event, the court below was correct. Proof of lost time due to petitioner's discharge would not be proof of lost time due to his injury. Indeed, proof by petitioner that he had lost time due to his discharge, rather than his injury, would be defeating his claim, rather than supporting it. Moreover, as the opinion of the court below makes clear (Pet. App. pp. A9-A11), the evidence which the court held improperly admitted was not limited to the discharge of petitioner. His counsel also dealt at length on the discharge of another employee and sought to cross-examine a number of his own witnesses on the issue of threatened discharges. None of this was relevant to petitioner's claim for personal injury resulting from a Safety Appliance Act violation, and was highly prejudicial as well. The decision so holding is consistent with similar holdings by the federal courts. *Anderson* v. *L. & A. Ry. Co.*, 457 F.2d 784 (5th Cir. 1972); *Beanland* v. *Chicago, R.I. & P. Ry. Co.*, 480 F.2d 109 (8th Cir. 1973); *Kelly* v. *New York, N.H. & H. R.R. Co.*, 138 F. Supp. 82 (D. Mass. 1956). *Barnes* v. *Norfolk Southern Ry. Co.*, 333 F.2d 192 (4th Cir. 1964) is not to the contrary. The F.E.L.A. plaintiff in that action sought to prove that the

railroad had discharged him because of the disability resulting from the F.E.L.A. injury. The issue as to the discharge was, in consequence, directly related to the F.E.L.A. claim. That relation does not exist in the present case.

The other cases cited by petitioner furnish no support for his position. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) held that an adverse arbitral award by the Equal Employment Opportunity Commission did not bar an action to enforce rights under the Civil Rights Act. *Hendley* v. *Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980), similarly held that a court could enjoin a disciplinary proceeding when it was motivated by a retaliatory purpose in violation of § 60 of the F.E.L.A. No doubt, if petitioner was wrongfully suspended in connection with his action in firing the .22, he would have a claim against respondent for wrongful discharge by way of administrative proceedings under the Railway Labor Act. 45 U.S.C. § 153 First (i); *Sharkey* v. *Penn Central Transportation Co.*, 493 F.2d 685, 688 (2d Cir. 1974). But that claim has nothing to do with his action for damages resulting from personal injuries.

3. The decision below is also independently supported by the Court of Appeals' second conclusion: that "the conduct of this trial contained such extensive and grossly improper prejudicial remarks directed at the appellant [respondent], that it is impossible for us to say that the verdict was not infected with undue bias (Code Ann. § 105-2015)" (Pet. App. p. A11). This clearly raises no federal question reviewable by this Court.

CONCLUSION

The petition for certiorari presents no issues warranting review by this Court and should be denied.

Respectfully submitted,

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